IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 7020 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE A.S.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KALPESH @ TINO JAYANTIBHAI PATEL & 1 - Applicant(s)
Versus
STATE OF GUJARAT - Respondent(s)

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Appearance :
MR BM MANGUKIYA learned advocate with MS BELA A PRAJAPATI for the Applicants
MR AY KOGJE, learned APP, for Respondent

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CORAM : HONOURABLE MR.JUSTICE A.S.DAVE

Date : 05/07/2007

ORAL JUDGMENT

1. This application under Section 439 of the

Code of Criminal Procedure, 1973 is filed by the applicants, who are the accused of offences punishable under Sections 302, 504 and 114 of the Indian Penal Code, 1860 read with Section 135 of the Bombay Police Act, registered against them vide C.R. No I-36 of 2007 with Kothamba Police Station on 18th April, 2007, before even the report under Section 173 (2) of Cr.PC is filed by the Investigating Agency.

2. The case of the prosecution is that Mrs. Niruben, wife of the deceased Gordhanbhai Kantibhai Patel, residing at village Chapatiya with her husband and two children, lodged the above F.I.R. on 18th April, 2007 at about 11-45 a.m. for the incident alleged to have taken place on 13th April, 2007 early in the morning at about 5-30 a.m. As per the informant, on 13th April, 2007, at about 5-00 a.m., she had gone to milk dairy for supplying milk and while she was returning from the dairy, Kalpesh @ Tino Jayantibhai Patel-applicant No.1 herein, whose house is situated opposite to the informant, abused her and told that why she was passing through the

land owned by the applicants. The above facts were narrated by the informant to her husband Gordhanbhai, and therefore, her husband questioned said Kalpesh-applicant No.1 herein that why he abused his wife and on saying so, the applicant No.1 took out a wooden log of a cart and inflicted first blow on the left side of the abdomen, second blow was inflicted on the right hand and third blow was inflicted on the back side of the ear of the deceased Gordhanbhai. Along with the applicants, one other person named Jayantibhai Mathurbhai Patel was also present, who instigated the applicants to kill the husband of the informant. The applicant No.2 also inflicted kick and fist blows on the deceased. Thereafter, due to intervention of the elder brother-in-law of the complainant and his two sons, husband of the informant was brought to the residence and as the husband of the informant made a complaint of severe pain, he was taken to the hospital in nearby town Lunawada and thereafter, he was taken for treatment at V.S. Hospital, Ahmedabad, where after the treatment, the husband of the informant expired.

3. It is stated by the informant that initially the cause of the death was not disclosed to the doctor and the complaint was not lodged on very same day in view of the fact that the applicants-accused are her neighbours and belong to the same caste and to avoid harassment by the applicants, but thereafter, it was decided to file the complaint with correct facts.

4. Shri Mangukia, learned advocate appearing for the applicants, has submitted that initially the complainant had not disclosed to the doctor at the hospital at Lunawada or even later on at V.S.Hospital, Ahmedabad about the injuries received by her husband. According to him, the cause of death of the deceased Gordhanbhai is natural. He has further submitted that it is not a case of homicide and the deceased Gordhabbhai, who was suffering from brain tumor, died a natural death and even lodging of complaint after five days do not inspire any confidence so far as version of the complainant is concerned. Mr. Mangukia, learned advocate for the applicants, therefore, submitted that it is not a

case which even prima facie attracts the offence under Section 302 of Indian Penal Code, and therefore, the applicants be enlarged on bail in exercise of the powers under Section 439 of the Code of Criminal Procedure.

5. I have heard Mr. A.Y.Kogje, learned A.P.P. for the State. It is submitted by the learned A.P.P. that report under Section 173 (2) of the Code of Criminal Procedure is yet not filed, the investigation is not over and even cause of death is also not known. Therefore, according to learned APP, at this stage, no case is made out for grant of regular bail under Section 439 of the Code of Criminal Procedure.

6. Before I advert to my conclusions, it would be profitable to refer to a decision of the Apex Court reported in AIR 1962 SC 253 The State VS Captain Jagjit Singh reported in AIR 1962 SC 253 with regard to the considerations which may weigh with the Court while considering an application under Section 439 of the Code of Criminal Procedure. In the said

decision, the Apex Court has laid down the considerations while considering an application under Section 439 of the Code of Criminal Procedure such as nature and seriousness of the offence, the character of the evidence, circumstances which are peculiar to the accused, a reasonable possibility of the presence of the accused not being secured at the trial, reasonable apprehension of witnesses being tempered with, the larger interest of the public or the State. Later on the said considerations were reiterated by the Apex Court in the case of Jayendra Saraswathi Swamigal v. State of and other reported in 2005 Criminal 177.

Thus, when the accused are facing allegations of committing offence under Section 302 of IPC, for the following reasons I am not inclined to exercise discretionary jurisdiction under Section 439 of the Code of Criminal Procedure.

7. Having heard the learned advocate for the applicants and learned APP for the State and on perusal of the relevant record produced along with

the case papers, it is revealed that report under Section 173 (2) of the Code of Criminal Procedure is not filed and the investigation is not completed. Even the cause of death is not known and report is yet awaited. So far as the allegations made in the F.I.R. are concerned, the complainant, wife of the deceased Gordhanbhai, has clearly stated that initially she had not disclosed before the doctor about the cause of the death due to harassment that may be caused by the applicants and out of fear since the applicants are the neighbours of the complainant and belong to the same locality and caste. The complainant has clearly stated about the role played by the applicant No.1 in inflicting injuries by a heavy wooden log of a cart on the left side of the abdomen and on the back side of the ear of the deceased and they are vital parts of the body of the deceased and the applicant No.2 inflicted fist and kick blows when the deceased Gordhanbhai fell down and thus, caused injuries to him. At this stage, in absence of the charge sheet to be filed under Section 173 (2) of the Code of Criminal Procedure, it is difficult to appreciate the contentions of Mr.

Mangukiya, learned advocate appearing for the applicants, that the case on hand is not of homicide and ingredients of Section 302 of the Indian Penal Code are not attracted. As stated in the F.I.R., the applicants are the neighbours of the complainant and belonging to the same caste and locality and even it is also revealed from the application of bail that the deceased was suffering from brain tumor and was sick. In such eventuality, possibility can not be ruled out that the applicants being neighbours and belonging to the same caste, knowing fully well that the deceased Gordhanbhai was suffering from brain tumor and infliction of injuries by a wooden log or even kick and fist blows may be sufficient enough to cause death of Gordhanbhai would certainly attract the ingredients of 'culpable homicide' as defined in Section 299 and even 'murder' as defined in Section 300 of the Indian Penal Code.

To understand the above proposition, a recent decision rendered by the Hon'ble Apex Court in the case of Laxman vs. State of M.P. reported in (2007) 1 scc (cRI) 449 would be relevant. In the said

decision, ingredients of Section 299 and 300 IPC and difference between Sections 299 and 300 of the Indian Penal Code are discussed in a comparative table in para 9. The said comparative chart is reproduced as under:

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done-	**Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done-**
	Intention
(a)with the intention of causing death ; or	**(1)with the intention of causing death; or**
(b)with the intention of causing such bodily injury as is likely to cause death ; or	**(2)with the intention of causing such bodily injuries as the offender knows to be likely to cause the death of the person to whom the**

harm is caused ; or

(3)with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death ; or

Knowledge

(c)with the knowledge that the act is likely to cause death.

(4)with the knowledge that the act is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing

death or such injury as is mentioned above.

In the said decision in paras 10 and 11, the Hon'ble Apex Court has held as under :

> **10. Clause (b) of Section 299 IPC corresponds with clause (2) and (3) of Section 300 IPC. The distinguishing feature of the mens rea requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the “intention to cause death” is not an essential requirement of clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by Illustration**

(b) appended to Section 300 IPC.

11. Clause (b) of Section 299 IPC does not postulate any such knowledge on the part of the offender. Instances of cases falling under clause (2) of Section 300 IPC can be where the assailant causes death by a fist-blow, intentionally given, knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver or spleen, or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given. In clause (3) of Section 300 IPC, instead of the words "likely to cause death" occurring in the corresponding clause (b) of Section 299 IPC, the words "sufficient in the ordinary course of nature" have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in

> **the ordinary course of nature to cause death. The distinction is fine but real and if overlooked, may result in miscarriage of justice. The difference between clause (b) of Section 299 IPC and clause (3) of Section 300 IPC is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or of the lowest degree. The word "likely" in clause (b) of Section 299 IPC conveys the sense of probability as distinguished from a mere possibility. The words "bodily injury.... sufficient in the ordinary couse of nature to cause death" mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature.**

After considering the case of *Virsa Singh vs. State of Punjab* reported in A.I.R. 1958 S.C. 465 and the ingredients of Section 300 IPC discussed therein, the Apex Court in para 16 has held that "even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the

intention of causing death, the offence would be murder."

In para 18 of the said judgment (supra), the Apex Court has observed that sometimes the facts are so intertwined and second and third stage is so telescoped into each-other, that it may not be convenient to give a separate treatment to the matters involving second and third stages. Thus, when the report under Section 173 (2) of Cr.PC is not before this Court, in a serious offence attracting Section 302 of IPC, discretion vested in this Court under Section 439 of Cr.PC can not be exercised.

8. Besides, as it is stated in the memo of application that the applicants were neighbours of the complainant, belonging to the same caste and locality, possibility can not be ruled out that even during the course of investigation the aspect about the knowledge of the applicants that the deceased Gordhanbhai is having serious disease of brain tumor and then inflicting injuries with wooden log and fist and kick blows on the vital part of the body of the

deceased may find place in the report under Section 173 (2) of Cr.PC. Thus, at this stage, it can not be presumed that the death of the deceased Gordhanbhai was natural and it is not a case of homicide.

Thus, the facts of the case on hand may fall under Clause (c) of Section 299 IPC or Clause (2) of Section 300 of IPC and the above aspects can be determined after the investigation is over and only at the stage of trial, where evidence can be appreciated in correct prospective.

9. Considering all above aspects, when the investigation is yet not completed, the post-mortem report is awaited, cause of death is not known and report under Section 173 (2) of Cr.PC is not filed, exercise of the powers under Section 439 of the Code of Criminal Procedure is not warranted. Further, in view of the seriousness of the offence, role attributed to the present applicants, hitting wooden log on an abdomen and back side of an ear coupled with fist and kick blows in inflicting the injuries to the deceased and the fact that the applicants may

have knowledge about the serious disease of brain tumor to the deceased being neighbours and of same locality and caste, exercise of the powers under Section 439 of the Code of Criminal Procedure is not warranted.

10. For the aforesaid reasons, the application is rejected.

(ANANT. S. DAVE, J.)

*mithabhai